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**Cc:** James Chadwick

**Subject:** FW: employee misconduct

Here are some questions that I would pose after reading the City Attorney's memo on employee misconduct. Feel free to share these with anyone who might be interested.

I mentioned this yesterday, but if there is any city policy or written procedure on misconduct findings, hearings, etc., it would help immensely for the subcommittee members to get a copy.

Your memo lays out four issues that would govern disclosure of information regarding employee misconduct:

- 1.) What level is the employee?
- 2.) What kind of records are being sought?
- 3.) What is the nature of the misconduct?
- 4.) What level of evidence supports the allegations?

Let me go through those, summarizing what I think I'm getting from the memo and asking additional questions.

### **The level of the employee**

As I read your memo, you suggest that the case law on disciplinary records treats "public employees" differently from "public officials." Which city officials are public officials, and which are public employees? The more specific you can make this answer, the better.

### **The level of evidence supporting the allegations**

I'm now going to attempt to summarize what I think your memo says regarding the level of evidence that must support an allegation in order for it to be disclosed. The level varies, as I understand it, depending on whether we are talking about a public official or a public employee. In neither case is the standard that the charges must be true, or that discipline has actually been imposed; in fact, it seems to me that the standard is lower than that, and that cases where charges are true or discipline has been imposed easily clear the "level of evidence" hurdle.

- For public employees, the language from Bakersfield applies -- "where the allegations are substantial in nature, as distinct from baseless or trivial, and there is reason to believe the complaint is well founded."
- For public officials, the language from BRV applies -- where "the allegations are not so unreliable that they could not be anything but false."

Is that correct?

### **The kinds of records that must be disclosed**

The only indication your memo relays as to the kinds of records that must be released is the AFSCME standard: "information about the complaint, the discipline and the

information upon which it is based.” Am I reading that right? Can you tell us what sorts of records would meet that standard and what records would not meet that standard?

### **The nature of the misconduct**

The only thing I see in your memo that goes to the nature of the alleged misconduct would be Bakersfield, assuming it can be read in that way: “where the allegations are substantial in nature, as distinct from baseless or trivial.’ Does that mean that any allegations regarding offenses that are more than trivial would meet the threshold for the “nature of the alleged misconduct” that has to be disclosed? What kinds of misconduct would the city regard as trivial? Or is there another standard for the level of seriousness that you would propose?

Here are some additional questions:

Is the language the subcommittee has already recommended on investigations – which would protect the identities of employees who provide information in an internal investigation -- sufficient to allay the concerns in part 2 of your memo? If not, what would be?

Could the city be liable for revealing information about an employee which is required to be revealed under the CPRA? Under the sunshine law?

Do you see any other legal obstacles for the city if it tried to interpret the legal standards articulated in AFSCME, Bakersfield and BRV and write them into the sunshine law?